IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

Civil Revision No.49 of 2001.

Judgment Reserved on:18.09.2007

Date of decision: 28.09.2007

Krishan Lal Gupta **….Petitioner**

Versus

Brij Lal & Another **….Respondents**

Coram

The Hon'ble Mr.Justice Dev Darshan Sud,J.

Whether approved for reporting ?[1]

For the Petitioner: **Mr.Ajay Sharma, Advocate.**

For Respondents 1 & 2: **Mr.Bhupender Gupta, Senior Advocate with Ms.Charu Gupta, Advocate.**

Dev Darshan Sud,J.

This revision petition has been instituted by the Landlord under Section 24(5) of the H.P. Urban Rent Control Act, 1987 (hereinafter referred to as the "Act") against the judgment and order of the learned Appellate Authority dismissing the eviction petition instituted by the petitioner against his tenant on the ground of subletting.

Brief facts of the case are that the petitioner who is the landlord, instituted ejectment proceedings against the respondents on the allegations that the premises had been let out to respondent No.1,

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[1] ***Whether the reporters of Local Papers may be allowed to see the judgement***?

Brij Lal, who was the tenant in the suit premises was, in arrears of rent and that the shop had been sublet by him to respondent No.2 Sadhu Ram without his permission. It is undisputed before me that the premises were let out for commercial purposes. The eviction petition was resisted on a number of grounds. It was pleaded that the landlord was habitual in not issuing receipts for the rent received by him and that respondent No.2 is his brother who had been working/assisting him in the business carried out in the suit premises.

The learned Rent Controller, allowed the Eviction Petition holding that tenant-respondent No.1 was in arrears of rent. On the question of subletting, the learned Rent Controller found in favour of the landlord holding that respondent No.1 had sublet the premises to respondent No.2. For arriving at this conclusion the learned Rent Controller relied upon the evidence of PW-1 Dalbir Singh who was the Postman of the beat and who had testified that the letters/post in the suit premises were being delivered in the name of "Parveen Handloom" where respondent No.2 used to sit. He never saw Brij Lal, respondent No.1, sitting in the shop. PW-2 Vinay Kumar, who is a Meter Reader employed with the Himachal Pradesh State Electricity Board, has stated that he used to go to the shop for checking the meter to ascertain the electricity consumption for billing

purposes. He also states that business of handloom was being carried out in the suit premises. PW-3 Shri P.C. Bhadwal is a Shop Inspector, who has testified that the shop was registered under the Shop and Commercial Establishment Act in the name and style of M/s.New Friends Tailor, Hospital Gali, Kangra. The licence issued was valid up to 1993-94 and thereafter it was not renewed. He states that on 24.12.1995 when he conducted the inspection of the premises, he found that business of handloom was being carried out in the demised premises. PW-5 Om Raj also states that the business of Handloom is being carried in the demised premises. PW-6 is one Shri Ranjit Singh, who was the Excise and Taxation Inspector and has stated that a shop of Parveen Handloom registered at Serial No.559.

The evidence on behalf of the respondents has not been considered in detail by the learned Rent Controller, who, on the basis of the evidence of the witnesses of the Landlord, decreed the petition for eviction without in any manner considering the evidence on record to arrive at a finding as to whether the tenant had parted possession with the position of the premises and that the sub-tenant was in exclusive possession of the shop or not for valuable consideration.

In appeal by the tenant on the issue of subletting, the learned Appellate Authority, after appraisal of the evidence, held that the necessary ingredients of subletting namely; that the sub tenant

must have exclusive possession of the premises and that this must be done on payment of consideration, was not established on the record. The learned Appellate Authority held that there was no evidence establishing exclusive possession or control of respondent No.2 over the premises or of respondent No.1 parting with the possession of the premises exclusively to respondent No.2. He notices that PW-4 Rishi Kumar and PW-5 Om Raj admit that both the respondents are sitting in the shop. The petition was accordingly dismissed.

I have heard learned counsel for the parties and have gone through the record of the case.

Learned counsel appearing for the petitioner submits that the learned Appellate Authority has erred in allowing the appeal as evidence on the record clearly establishes that the premises had been sublet by respondent No.1 to respondent No.2. He submits that the witnesses of the petitioner namely; PW-1 Postman Dalbir Singh, PW-2 Vinay Kumar, Meter Reader, PW-3 P.C. Bhadwal, Shop Inspector and PW-6 Ranjit Singh, Excise and Taxation Inspector, have stated in unison that the exclusive control and possession over the premises is that of respondent No.2 and that the nature of the business has been changed. In these circumstances, he submits that the necessary ingredients for proving subletting as required by Section 14 of the Act, have been established on the

record and that if the evidence is assessed or re-appreciated objectively, there can be no conclusion except that respondent No.1 had abandoned his tenancy by putting respondent No.2 in exclusive control of the demised premises.

Before taking up the submissions made by the learned counsel appearing for the tenant, it would be worthwhile to notice that the approach of the learned Rent Controller cannot commend itself for acceptance. He has placed reliance on the oral testimony of witnesses of facts which were to be established from records. The evidence of the Postman PW-1 Dalbir Singh and PW-2 Vinay Kumar, Meter Reader, can be hardly satisfactory to prove the ingredients of subletting. They cannot state anything regarding the exclusive control or parting of the possession of the premises in favour of respondent No.2 with or without consideration. It is common knowledge that in the family business, there can be other family members who assist in carrying on the business. Surely, the Postman was not present in or near the premises throughout the day. He would only visit if and when there was any letters addressed to the respondents. On the evidence of Vinay Kumar, Meter Reader, from the H.P. State Electricity Board, who appeared as PW-2, all that need be said is that meter reading is not an activity which is carried out throughout the month or year. Such reading is taken once in a month or in two

months when the electricity consumption bills are prepared and he cannot prove the ingredients of subletting. On the evidence of the Shop Inspector PW-3 and Excise and Taxation Inspector PW-6, suffice it to say that these witnesses had to testify from the record which admittedly was neither produced nor proved in accordance with law. The reasons for withholding or not summoning such record are not clear. In any event, there can be no difficulty in drawing an adverse inference against the petitioner-landlord that in case this record had been produced, it would have been contrary to the stand urged by him. It is indeed, strange as to why the record under the Shop and Commercial Establishment Act and also under the Excise and Taxation Act has not been summoned and produced. Ex.PW-6/A, which is a photocopy of an extract of a list showing the name of shops cannot be treated as primary evidence and even when taken as un-rebutted, does not and cannot establish the case of the respondent. Section 14 of the Act dealing with sub-letting provides:-

> ***"14. Eviction of tenants.- (1)*** … … … …
>
> ***(2)*** *A landlord who seeks to evict his tenant shall apply to the Controller for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause*

> *against the applicant, it satisfied-*
>
> *(i) … … … … … … … … … … … … … …*
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> *(ii) That the tenant has after the commencement of this Act without the written consent of the landlord-*
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> *(a) transferred his rights under the lease or sublet the entire building or rented land or any portion thereof, or*
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> *(b) used the building or rented land for a purpose other than that for which it was leased; or*

It is by now well settled that the provisions under the corresponding Rent Acts of other States and notably namely; of Delhi, Punjab, Haryana and Chandigarh in pari-materia with the provisions of this Act and have been the subject matter of judicial pronouncements by the Hon'ble Supreme Court.

In ***Jagan Nath (Deceased) through LRs. vs. Chander Bhan and others, AIR 1988 SC 1362,*** the Hon'ble Supreme Court has held:

> *"6. THE question for consideration is whether the mischief contemplated under S. 14 (1) (b) of the Act has been committed as the tenant had sublet, assigned, or otherwise parted with the possession of the whole or part of the*

premises without obtaining the consent in writing of the landlord. There is no dispute that there was no consent in writing of the landlord in this case. There is also no evidence that there has been any subletting or assignment. The only ground perhaps upon which the landlord was seeking eviction was parting with possession. It is well settled that parting with possession meant giving possession to persons other than those to whom possession had been given by the lease and the parting with possession must have been by the tenant, user by other person is not parting with possession so long as the tenant retains the legal possession himself, or in other words there must be vesting of possession by the tenant in another person by divesting himself not only of physical possession but also of the right to possession. So long as the tenant retains the right to possession there is no parting with possession in terms of Cl. (b) of S. 14 (1) of the Act. Even though the father had retired from the business and the sons had been looking after the business in the facts of this case, it cannot be said that the father had divested himself of the legal right to be in possession. If the father has a right to displace the possession of the occupants, i.e. , his sons, it cannot be said that the tenant had parted with possession. This court in Smt. Krishnawati v. Hans Raj, (1974) 1 SCC

> *289 : (AIR 1974 SC 280) had occasion to discuss the same aspect of the matter. There two persons lived in a house as husband and wife and one of them who rented the premises allowed the other to carry on business in a part of it. The question was whether it amounted to sub-letting and attracted the provisions of subsection (4) of S. 14 of the Delhi Rent Control Act. This Court held that if two persons live together in a house as husband and wife and one of them who owns the house allows the other to carry on business in a part of it, it will be in the absence of any other evidence a rash inference to draw that the owner has let out that part of the premises. In this case if the father was carrying on the business with his sons and the family was a joint Hindu family, it is difficult to presume that the father had parted with possession legally to attract the mischief of S. 14 (1) (b) of the Act."*

This proposition of law is now well settled and does not admit any other ingredient.

In ***Kala and another vs. Madho Parshad Vaidya, AIR 1998 SC 2773,*** the Hon'ble Supreme Court was dealing with the case where the question of subletting including the fact as to whether the change in the nature of business constituted an act coming

within the mischief of subletting as contemplated by Section 14(2)(ii) of the Act. It was held:

> *"**16.** The evidence led by the respondent-landlord is not only vague, inconclusive but is also unsatisfactory. The respondent-landlord did not even allege in his evidence that appellant No. 1 had sub-let the premises in favour of appellant No. 2. The learned Rent Controller had thus rightly come to the conclusion that appellant No. 1 had not parted with the possession of the demised premises after the death of her husband and that she had not sub-let the same to appellant No. 2. The findings recorded by the learned Rent Controller were based on proper and correct appreciation of evidence and other material on the record.*
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> ***17.** The findings recorded by the appellate authority to the effect that because of the change of the nature of business from selling of cigarettes and bidis during the lifetime of Shri Hira Lal Sehgal, to the selling of sanitary-wares in the demised premises, it demonstrated that appellant No. 1 had parted with possession of the shop in favour of appellant No. 2 is wholly conjectural and irrational. A grave error was, therefore, committed by the appellant authority in coming to the conclusion of sub-letting in total disregard of the evidence on the*

> *record. The appellate authority as well as the High Court drew up a rather rash inference from the change of business, which was wholly uncalled for. The onus to prove sub-letting is on the landlord and if he establishes parting of with the possession in favour of a third party, the onus would shift to the tenant to explain. In the instant case, however, the landlord did not discharge the initial onus and although it was not required yet, the tenant explained how appellant No. 2 had the permissive possession of the shop as its Manager. On the established facts and circumstances of the case, the plea of sub-letting was not established."*
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> ***(emphasis supplied)***

In the present case the onus has not been discharged by the landlord. Learned counsel for the tenant has also drawn my attention to the decision of the Punjab and Haryana High Court in ***Anil Kumar vs. Sita Devi and another, 2006(2) RCR 417,*** in support of his contention that the necessary ingredient of parting with exclusive possession in favour of sub-tenant is a necessary ingredient of sub-letting which has neither been established nor proved on the record of the case. The law laid down in this judgment is no different from the law laid down by the Hon'ble Supreme Court that exclusive possession and control of the sub-tenant must be established on the

record and that the onus and burden is on the landlord.

Learned counsel appearing for the petitioner submits that pleadings and the evidence may not be considered in a hyper technical manner and that the approach should be justice oriented. He submits that once the basic fact of sub-letting has been pleaded, and there is sufficient evidence on record, the technicalities of procedure or interpretation would not stand in the way of this Court for granting relief to the landlord. He places reliance on ***Kulwant Kaur and Others vs. Gurdial Singh Mann (Dead by LRs. And others, (2001) 4 SCC 262***, commending a justice oriented approach in litigation. He also places reliance on the judgment of the High Court of Punjab and Haryana in ***Smt.Swaran Lata vs. Dev Kumar (dead) through his L.Rs, 1992(2) RCR 80***, in support of his contention that where a sub-tenant is carrying on a business in the premises and the tenant has no control over the premises, the necessary ingredients of sub-letting are established entitling the landlord for the relief as prayed for. He seeks support from the decision of **Balwant Rai and Ors. Vs. Gauri Shankar, 1987(1) RCR 474**, to urge that the facts on record establish sub-letting.

None of the judgments relied upon by the learned counsel appearing for the petitioner hold that the ingredients of sub-letting do not require parting

with the possession or putting the sub-tenant in exclusive possession.

I find that there is no perversity in the reasoning and the appreciation of evidence by the Appellate Authority. The landlord having failed to establish the basic ingredients of sub-letting as required under Section 14(2)(ii) of the Act cannot urge that an order of eviction be passed in his favour. I have held that the evidence of the petitioner-landlord does not establish any of the ingredients of sub-letting and that the learned Rent Controller was in grave error in relying upon the oral testimony of the witnesses which should otherwise have been established from the official record in the nature of the record maintained under the Shop and Commercial Establishments Act and the Excise, and Sales Tax Act etc. which was not produced for reasons best known to the petitioner. The Postman and the Meter Reader could not be witnesses who could prove the landlord's case. All these witnesses including the Shop Inspector and Excise and Taxation Inspector would be casual visitors unacquainted with the day to day working of the respondents. The evidence of the petitioner viz. PW-4 Rishi Kumar and PW-5 Om Raj who admit that both the respondents are working in the demised premises. The approach of the learned Rent Controller to say the least was perverse and was not based on any known legal principle of the law of

evidence to prove a particular fact. In the facts and circumstances of the case, I do not find any merit in this revision which is accordingly dismissed. There shall be no order as to costs.

September 28, 2007. **(Dev Darshan Sud)**
(aks) **Judge.**